No. 12,157

IN THE

United States Court of Appeals

For the Ninth Circuit

ALEXANDER LAWRENCE ALPERS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURT'S JURISDICTION.

This is an appeal by Alexander Lawrence Alpers, defendant in the District Court, from a judgment of conviction (R. 8, 9) on Counts One and Two of an Information (R. 2, 3, 4) following a trial by the court sitting without a jury. Each of the above counts charged appellant with a separate violation of Title 18 U.S.C.A., Section 396, consisting of knowingly depositing with the Railway Express Agency, for carriage in interstate commerce, certain obscene phonograph records.

The appellant waived indictment (R. 4, 5) and was prosecuted by Information as above stated. The ap-

pellant moved to dismiss the Information (R. 5) before arraignment and the motion after argument and hearing was denied. (R. 7.) The defendant pleaded "Not Guilty" to the charges preferred against him (R. 8), and waived trial by jury. (R. 6.) Thereafter the United States presented its case to the court, at the conclusion of which appellant made an oral motion for dismissal which was denied. The court then found appellant guilty on Counts One and Two, Count Three having been dismissed. The court fined appellant $100.00 on each of Counts One and Two. (R. 8, 9.) The appellant thereafter filed his notice of appeal (R. 9, 10) from the judgment and fines.

STATUTORY PROVISIONS SUSTAINING JURISDICTION OF COURTS.

The District Court below had jurisdiction of this case by virtue of Title 28 U.S.C.A., Section 41, subdivisions 2 and 8, and the appeal was taken to this court under Rules 37 and 39 of the Rules of Criminal Procedure for the District Courts of the United States.

This court has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28 U.S.C.A., Section 225, subdivisions (a) first and third and subdivision (d).

The pleadings necessary to show the existence of the jurisdiction are the Information (R. 2, 3, 4), the plea of not guilty (R. 8) and the judgment sen-

tence and fines. (R. 8, 9.) The facts disclosing the basis of the jurisdiction of the court below in the initial trial and the jurisdiction of this court to review that judgment are set out in the statement of the case herein.

STATUTE INVOLVED.

The applicable part of Title 18 U.S.C.A., Section 396, reading as follows:

> TITLE 18 USCA, Section 396: "Whoever shall * * * knowingly deposit or cause to be deposited with any express company or other common carrier for carriage from one State, Territory or District of the United States * * * to any other State, Territory or District of the United States * * * any obscene, lewd or lascivious, or any filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of an indecent character * * *"

STATEMENT OF THE CASE.

The facts of this case are as set forth in the Information. Appellant knowingly deposited with the Railway Express Agency for carriage in interstate commerce from San Francisco, California, to Olympia, Washington, and to Dallas, Texas, a package containing certain obscene phonograph records. Appellant waived indictment and was charged by Information. Appellant also waived trial by jury, was

found guilty and fined as hereinbefore set forth and appealed from said judgment.

QUESTIONS INVOLVED.

The sole issue upon this appeal is whether or not phonograph records are within the purview of the words "or other matter of indecent character" as such words are used in Title 18 U.S.C.A., Section 396, the applicable part of which appears heretofore.

To assist the court in arriving at its decision as to the proper determination of this issue, the following sub-issues will be hereinafter discussed:

1. May statutes creating crimes be extended by intendment?

2. Is the shipment in interstate commerce of obscene phonograph records specifically prohibited by Title 18 U.S.C.A., Section 396?

3. Is Title 18 U.S.C.A., Section 396, an all-inclusive statute and do the words "or other matter of indecent character" include all types of obscene matter?

4. May the words "or other matter of indecent character" be interpreted to include phonograph records under the rule of *ejeusdem generis?*

SPECIFICATION OF ERRORS TO BE RELIED UPON.

1. The trial court erred in denying appellant's motion to dismiss the Information.

2. The trial court erred in finding the appellant guilty on Counts One and Two of the Information. (R. 8, 9.)

3. The finding of the trial court and the entry of judgment and sentence on Counts One and Two of the Information are void for each of said counts fails to state facts sufficient to constitute a crime against the United States, to-wit, that the shipment in interstate commerce of obscene phonograph records is not prohibited by any law of the United States.

ARGUMENT.

I.

STATUTES CREATING CRIMES MAY NOT BE EXTENDED BY INTENDMENT BECAUSE THE COURT THINKS THE LEGISLATURE SHOULD HAVE MADE THEM MORE COMPREHENSIVE, AS PENAL STATUTES MUST BE STRICTLY CONSTRUED IN ORDER THAT EVERYONE MAY KNOW HIS DUTY PLAINLY AND UNMISTAKABLY UNDER THE LAW.

Penal statutes are to be strictly construed in favor of the accused. The law zealously guards the rights of the individual no matter how much it may abhor his conduct. Under our system of law, no matter what the conduct of an individual may be, no matter how much we may feel that such conduct should be punished, the courts cannot punish that conduct un-

less it has been specifically delineated as a crime within the meaning and intendment of the statutes.

U. S. v. Wiltberger, 18 U.S. 76:

"From this review of the examination made of the act at bar it appears that the argument chiefly relied upon to prove that the words of one section descriptive of the place ought to be incorporated into another is the extreme improbability that Congress could have intended to make these differences with respect to place that their words import. We admit that it is extremely improbable, but probability is not a guide which a court in construing a penal statute may safely take. We can conceive no reason why other crimes which are not comprehended in this act should not be punished but Congress has not made them punishable, and this court cannot enlarge upon the Statute."

U. S. v. Weitzel, 246 U.S. 533 (to same effect).

Just as an accused is entitled to be acquitted of a charge unless there is proof beyond a reasonable doubt of his guilt upon the facts, so must an accused be dismissed if there is any reasonable doubt as to whether or not the acts he has committed constitute a crime.

Harrison v. Vore, 50 U.S. 372:

"In the construction of a penal statute all reasonable doubt concerning its meaning should operate in favor of the defendant."

Ex Parte Webb, 225 U. S. 663:

"A law creating a crime ought to be explicit and if ambiguous or uncertain it should be interpreted in favor of the liberty of the citizen."

Also:

Speeter v. U. S. (CCA-8), 42 Fed. (2d) 937;
Erbaugh v. U. S. (CCA-8), 173 Fed. 433.

While we may not approve of the conduct of the appellant in this instance, if there is reasonable doubt as to whether his conduct is prohibited by statute, that doubt must be resolved in favor of the accused. However much this court may regret that Congress has not enacted proper legislation, it cannot, under all the rules of law which must guide it in reaching its decision, add to the law something that does not exist therein and by *ex post facto* construction make a crime of acts not prohibited by statute, however morally wrong they may be. To do so would be to countenance and to encourage the breach of fundamental legal principles which would prove more harmful to society generally in the long run than the actions of the appellant have in this specific instance.

First National Bank of Anamoose v. U. S. (CCA-8), 206 Fed. 374:

"An act which was not clearly an offense by the expressed will of the Legislature before it was done, may not be lawfully or justly made so by construction after it is committed, either by interpretation or expression or by the expunging of its words by the judiciary. *Ex post facto* construction is as vicious as *ex post facto* legislation."

The principle of strict construction has found universal sanction in our administration of the law. The reason for its adoption and the adherence to it by the courts is well set forth in the case of *Smitkin v. U. S.* (CCA-7), 265 Fed. 489, at 494, where the court said:

> "Federal crimes exist only by virtue of Federal statutes, but the law making power is continuous. Congress can and does change, revise, substitute, amend and repeal at its will. Citizens and subjects are not consulted, and have no direct voice in choosing the phraseology. This situation has led to the universal adoption of the rule that penal statutes are to be strictly construed. This is a fundamental principle which, in our judgment, will never be altered. Why? Because the law making body owes the duty to citizens and subjects of making unmistakably clear those acts for the commision of which the citizen or subject may lose his life or liberty. * * * The burden lies on the lawmakers, and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts."

With these thoughts in mind we feel that in following the arguments hereinafter set forth, the court, no matter how reluctant it may be to do so, must come to the conclusion that the shipment of obscene phonograph records in interstate commerce does not, at present, constitute a crime against the United States.

II.

THE SHIPMENT IN INTERSTATE COMMERCE OF OBSCENE PHONOGRAPH RECORDS IS NOT SPECIFICALLY PROHIBITED BY TITLE 18 U.S.C.A., SECTION 396, AND UNLESS SUCH RECORDS ARE ENCOMPASSED IN THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS USED THEREIN, THE SHIPMENT OF SUCH RECORDS IN INTERSTATE COMMERCE DOES NOT CONSTITUTE A CRIME AGAINST THE UNITED STATES.

A simple reading of Title 18 U.S.C.A., Section 396 (ante, p. 3) clearly shows that the shipment in interstate commerce of obscene phonograph records is not specifically prohibited thereby. It follows, therefore, that it is only if phonograph records are within the meaning and intendment of the words "or other matter of indecent character", as such words are used in said statute, that the shipment thereof in interstate commerce constitutes a crime against the United States.

III.

TITLE 18 U.S.C.A., SECTION 396, IS NOT AN ALL-INCLUSIVE STATUTE. THEREFORE, THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS USED THEREIN CANNOT BE CONSTRUED TO PREVENT THE SHIPMENT IN INTERSTATE COMMERCE OF EVERY TYPE OF OBSCENE MATTER.

A. In amending Title 18 U.S.C.A., Section 396, in 1920, by adding the specific words "motion picture film" Congress demonstrated that this statute was not all-inclusive in scope and that the words "or other matter of indecent character" were not intended to include all types of obscene matter.

A review of the legislative history of Title 18 U.S.C.A., Section 396, reveals that this section was amended in 1920 by Congress to provide for the addi-

tion of the words "motion picture film" to the list of matter expressly and specifically forbidden by the statute. When the Legislature amends a statute it must be presumed that some change was intended.

U. S. v. Chase, 135 U.S. 255:

"An amendment was passed on September 26, 1888. For the first time in the history of the postal service the word 'letter' was included in the list of articles non-mailable by reason of being obscene * * * If letters were embraced in the statute upon which the indictment is founded why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that that body did not put the construction on the prior statute claimed in behalf of the United States else we would have it doing a vain and useless act."

U. S. v. Board of Commissioners (Dist. Ct. N.D. Okla.), 26 Fed. Supp. 270;

U. S. v. Southern Pacific (Dist. Ct. S.D. of Calif. N.D.), 230 Fed. 270.

What change was made by Congress in 1920? It could only have been the adding of something to the statute that had not existed therein before, the prohibition of something that had not been prohibited before. Paraphrasing the language of the *Chase* case cited above it could only have been that that body did not believe motion picture film was covered by the statute before, else we would have it doing a vain and useless act. At the time of this amendment the words "or other matter of indecent character" were an integral part of the statute. Were these general words

considered by Congress to be unrestricted in scope and application no amendment would have been made or required, because no amendment could have added anything to the statute. Therefore, when Congress did amend the statute to specifically cover motion picture film it unmistakably indicated that it did not believe the words "or other matter of indecent character" were all-inclusive in nature and covered every type of obscene matter. Congress further demonstrated that certain types of obscene matter were outside of the scope and intendment of the statute and of the general words employed therein.

B. By its enumeration of particular classes of obscene matter Congress evinced a clear intention of limiting the application of the statute and of the general words employed therein.

Where a statute employs specific words enumerating specific classes, modes or species, the statute should be construed as being limited in operation and not all-inclusive in scope. This principle of limitation attaches to the general words as well as to the specific enumeration. It is based upon the sound reason that if the legislature had intended the statute to be unrestricted in scope and the general words to be universal in application, it would have made no mention of special classes or things at all, but would only have employed general words such as "all persons who" or "any obscene or indecent matter." It is upon this sound and logical basis that the rule of *ejusdem generis* (infra) is founded.

In re Bush Terminal (CCA-2), 93 Fed. (2d) 659:

"The rule of *ejusdem generis* is based upon the theory that if the Legislature had intended general words to be used in their unrestricted sense, it would have made no mention of particular classes."

C. The title given by Congress to Title 18 U.S.C.A., Section 396, to-wit: "Importing and Transporting Obscene Books" indicates that the statute is not all-inclusive and that the general words employed therein are to be limited in scope and application.

While the title given to an act is not necessarily controlling, it may be looked to by the courts as an aid in interpreting and construing the statute and in determining the true intention of the Legislature in its enactment.

Goodcell v. Graham (CCA-9), 35 Fed. (2d) 586:

"The title of the section can be referred to for determining the proper interpretation of the section."

Holy Trinity Church v. U. S., 13 U.S. 457;
U. S. v. Katz, 271 U.S. 354.

The particular act in question is entitled "Importing and Transporting Obscene Books", a title which reveals that the act was designed specifically to restrict the transportation of obscene literature and that it was not intended to be all-inclusive in scope. This fact is underlined by an examination of the companion act which prohibits the transportation of obscene matter

in the mails. This latter section, Title 18 U.S.C.A., Section 334, bears the general title "Mailing Obscene Matter." This disparity in title is not accidental. The language employed in the substantive portions of Section 334 is far broader and much more comprehensive than the language employed in Section 396.

Title 18 U.S.C.A. has been recodified and revised. This monumental and exhaustive revision took five years of detailed study. It was completed and approved by Congress in 1948. The legislative history of this recodification and revision reveals that every part of each statute was given consideration, that language was changed, that titles were changed and that the arrangement of the sections within the code were reorganized. The legislative history further shows that each section was reviewed and examined, and re-reviewed and re-examined to the end that each section would clearly express in straightforward, easily understandable language its true intent, purpose and scope.

In the revised and recodified Title 18 former Sections 334 and 396 were placed one after the other in Chapter 71. Former Section 334 was renumbered Section 1461 and its title changed to read "Mailing obscene or crime inciting matter." Former Section 396 was renumbered Section 1462. The entire language of this section was modified and simplified. Its title was also changed. The title of this section now reads "Importation or transportation of obscene literature." It should be specifically noted that while revising the title to this section, Congress did not choose to use

the same general language applied by it to former Section 334. It would have been a simple matter for Congress to have made the title "Importation or transportation of obscene matter" had it felt this statute was general in application. It did not do so. Thus, it logically appears that Congress did not intend this section to be all-inclusive and that it never considered it to be so.

IV.

UNDER THE DOCTRINE OF EJUSDEM GENERIS PHONOGRAPH RECORDS, NOT BEING OF THE SAME SPECIES AS BOOKS, PAMPHLET, PICTURE, MOTION PICTURE FILM, PAPER, LETTER, WRITING, PRINT, ARE NOT WITHIN THE MEANING OF THE WORDS "OR OTHER MATTER OF INDECENT CHARACTER" AS SUCH WORDS ARE USED IN TITLE 18 U.S.C.A., SECTION 396.

A. The doctrine of ejusdem generis is a rule of statutory construction which provides that where general words follow the enumeration of particular classes or specific things, the general words are to be limited in their application to persons and things of the same species or genus as those specifically enumerated.

The principle of *ejusdem generis* is one of basic importance in the law of statutory construction. In practical application it simply means that where there is a specific enumeration of persons or things of the same class or species followed by a clause embracing "other" or "any" persons or things, the general words "other" or "any" are read as "other such

like'' or ''any such like'' and not as though they were unrestrictive in operation and effect.

U. S. v. Salem, 235 U. S. 237;

First National Bank of Anamoose v. U. S. (CCA-8), 206 Fed. 374.

The reason for the rule, as pointed out heretofore, is simply that if the general words of the statute were intended to prevail in their unrestricted and full sense, special words would not have been used at all.

B. The doctrine of ejusdem generis is particularly applicable to penal statutes.

Because penal statutes should be strictly construed in favor of the accused, the courts have universally held that the doctrine of *ejusdem generis* is particularly applicable to the construction of penal statutes.

First National Bank of Anamoose v. U. S. (CCA-8), 206 Fed. 374:

> ''The rule that where general words follow the enumeration of particular classes of persons or acts the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated, is particularly applicable to statutes defining crimes and regulating their punishment.''

U. S. v. Salem, 235 U. S. 237:

> ''The meaning of words is affected by their context and words in a highly penal statute will be interpreted in a narrower sense as referring to things of the same nature as those described in an enumerated list, although standing alone they might have a wider meaning.''

C. Under the doctrine of ejusdem generis where the act deals with specific things or particular modes only, the general words must be limited in their application to things and modes having the same attributes as those enumerated and cannot be extended to things or modes which are merely of a kindred nature.

In the application of the doctrine of *ejusdem generis* it is not enough that the matter complained of be of a kindred character with that sought to be legislated against. Where the statute deals in specific things or particular modes, the general words can be applied and extended only to those things or modes which have the same attributes as the things or modes listed in the statute.

People v. Powell (Mich.), 274 N.W. 372, 111 A.L.R. 721:

> "It is a well settled general rule and one specifically applicable in the interpretation of statutes which define crimes, that general words are to be restrained to the matter with which the act is dealing, and if dealing with specific things or particular modes only, the general words must be limited to such things or modes."

U. S. v. Wiltberger, 18 U. S. 76:

> "The principle that a case which is within the reason or mischief of a statute is within its provisions will not be carried so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those which are enumerated."

A survey of a few of the cases which have been decided in various jurisdictions concretely shows the

application of this principle. In *Parkman v. Lemmon,* 119 Kansas 323, 44 A.L.R. 1500, the court held that a shotgun, although a dangerous weapon, was not within the meaning of the words "or other dangerous weapons" as used in a statute which provided "Any person who shall sell, trade, give, loan or otherwise furnish any pistol, revolver or toy pistol by which cartridges may be exploded, or any dirk, bowie knife, brass knuckles, slung shot *or other dangerous weapon"* on the grounds that *all of the specifically enumerated weapons were hand weapons* normally designed for use in self-defense and for secretion on the person, and that therefore *dangerous weapons not of such class* or species were not to be construed as being within the general language of the statute under the doctrine of *ejusdem generis.*

In the case of *In re Bush Terminal Co.* (CCA-2), 93 Fed. (2d) 659, the court held that under the rule of *ejusdem generis* the words *"other combustibles"* as used in the New York City personal property tax imposing a tax on "oil, gas, gasoline *and other combustibles"* did not include coal and that coal was not taxable notwithstanding the fact that it was a *combustible.*

The list of examples could be extended by citations from almost every jurisdiction. The underlying principle would always be the same.

State of Missouri v. Wilson, 166 S.W. (2d) 499;

Denver v. Taylor, 292 Pac. 594;

In re Barre Water Co., 62 Vt. 27;

Resnick v. Boyd, 99 Pa. 555;
People v. McKean, 76 Cal. App. 114;
U. S. v. Steever, 222 U. S. 167.

D. Phonograph records are not of the same species as "book, pamphlet, picture, motion picture film, paper, letter, writing, print" and therefore the words "or other matter of indecent character" as used in Title 18 U.S.C.A., Section 396, cannot be construed to prohibit their shipment in interstate commerce.

There are two distinct species of obscene matter—*visual representations* and *auditory representations.* These two distinct, prime classes, represent the two means whereby obscene material may be communicated to the human mind. Within these two major classifications are various sub-classifications which are based upon any number of minor distinctions, such as whether the representation is graphic or lingual, whether the representation is designed for permanence of impression or is transitory in nature, whether the representation may be used with or without mechanical assistance. Whatever the minor sub-classification may be, however, all obscene representations must fit into one or the other of the two prime classes —they must either be *visual representations* or *auditory representations.*

Prior to 1920 all of the types of representation enumerated in Title 18 U.S.C.A., Section 396, fell within the broad classification of *visual representations.* The listed types of matter, "book, pamphlet, picture, paper, letter, writing and print" covered graphic and lingual representations of visual matter.

They were also permanent in nature. But all visual representations were not *ejusdem generis* with these items, for all these items possessed one further quality which set them apart as a distinct sub-species—they all could be read, seen and studied without the aid of any mechanical contrivance. When Congress amended the statute in 1920 to include the specific words "motion picture film" it indicated, as we have seen (Par. II, A., ante), that it did not believe that motion picture film was *ejusdem generis* with the specific items listed in the statute, and that it was covered thereby. While motion picture film belonged to the broad classification of *visual representation* it also had a special quality which distinguished it as a distinct sub-species—it required a mechanical device to enable it to be seen and observed. Since none of the enumerated articles were of this sub-species, it was necessary for Congress to add motion picture film to the statute by the use of specific language. By this amendment Congress did more than add mere motion picture film to the statute. Congress also added the important sub-species of visual representations which could only be used with the aid of mechanical devices, for other forms of visual representation requiring such devices would be *ejusdem generis* with motion picture film. By the addition of this sub-species the statute was extended to include all forms of visual representation. But the statute was not extended to include anything outside of the sphere of visual representation. All of the specifically enumerated articles still fell within this large, general classification.

Phonograph records are *auditory representations.* They belong to the second of the two broad species of obscene representations. Not being of the same species as any of the matter listed in the statute the words "or other matter of indecent character" cannot, under the doctrine of *ejusdem generis,* be extended by any strained construction to include phonograph records. Certainly, if it was necessary to amend the statute in 1920 to cover a sub-species of visual representation closely allied to the specific visual items then listed in the statute, it seems apparent that the statute should not be construed to include phonograph records which belong to a completely different species altogether.

The fact that phonograph records are not within the purview of the statute can be proven with almost mathematical certainty. We know that there are two means of conveying obscene matter to the human mind by visual or auditory representation. We know that with the amendment of 1920 the statute now covers all forms of visual representation either directly or under the doctrine of *ejusdem generis.* We know that the statute is not all-inclusive. We also know that if phonograph records are construed to be within the purview of the statute, under the doctrine of *ejusdem generis* all other forms of sound reproduction must also be construed to be within the statute. Thus, all means of auditory and visual representation would be covered. The statute would become all inclusive. But we know this cannot be true.

Therefore, since it is only by construction that we can read into the statute the words "phonograph records", and since such construction would be opposed to and irreconcilable with that which we definitely know is true about the statute, we must come to the conclusion that the words "or other matter of indecent character" cannot be construed to include phonograph records, and that phonograph records are not within the meaning and intendment of the statute.

CONCLUSION.

It is respectfully submitted that the District Court below erred in refusing to grant appellant's motion to dismiss the Information and that the judgment of the said court is void on the grounds that the shipment of obscene phonograph records in interstate commerce does not constitute a crime against the United States.

Dated, San Francisco, California,
March 9, 1949.

Respectfully submitted,
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